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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. VANCE LARCELL RIDER, Defendant and Appellant.	A143822 (San Mateo County Super. Ct. No. SC047362)

I.
INTRODUCTION

This is an appeal from an order denying Vance Larcell Rider's petition to recall his sentence under the Three Strikes Reform Act of 2012, which was enacted pursuant to Proposition 36 (the Act). (Pen. Code, § 1170.126.)[1] Rider's petition was denied because he has a prior conviction for a sexually violent offense, which makes him statutorily ineligible for resentencing under the Act. (§ 1170.126, subd. (e).) On appeal Rider contends the trial court committed reversible error by concluding that it did not have discretion to strike Rider's disqualifying prior conviction. We reject this contention and affirm the order.

[1] Statutory references are to the Penal Code, unless otherwise stated.

II.

STATUTORY OVERVIEW

"Under the original version of the three strikes law a recidivist with two or more prior strikes who is convicted of any new felony is subject to an indeterminate life sentence. The Act diluted the three strikes law by reserving the life sentence for cases where the current crime is a serious or violent felony or the prosecution has pled and proved an enumerated disqualifying factor. In all other cases, the recidivist will be sentenced as a second strike offender. [Citations.] The Act also created a postconviction release proceeding whereby a prisoner who is serving an indeterminate life sentence imposed pursuant to the three strikes law for a crime that is not a serious or violent felony and who is not disqualified, may have his or her sentence recalled and be sentenced as a second strike offender unless the court determines that resentencing would pose an unreasonable risk of danger to public safety. (§ 1170.126.)" (*People v. Yearwood* (2013) 213 Cal.App.4th 161, 167-168 (*Yearwood*).)

The instant appeal pertains to the postconviction release provisions of the Act. "Section 1170.126 grants the trial court the power to determine that an inmate serving 25 years to life as a third strike offender is eligible for resentencing as a second strike offender only if, as an initial matter, the inmate satisfies the three criteria set out in subdivision (e) of the statute. Those criteria are (1) The inmate is serving an indeterminate term of life imprisonment imposed under the three strikes law for a conviction of a felony or felonies that are not defined as serious and/or violent under section 667.5, subdivision (c) or section 1192.7, subdivision (c); (2) The inmate's current sentence was not imposed for a controlled substance offense with a specified weight enhancement, an enumerated sex offense, or an offense during the commission of which 'the defendant used a firearm, was armed with a firearm or deadly weapon, or intended to cause great bodily injury to another person' (§§ 667, subd. (e)(2)(C)(iii), 1170.12, subd. (c)(2)(C)(iii)); and (3) The inmate has no prior convictions for certain specified offenses. (See § 1170.126, subd. (e); §§ 667, subd. (e)(2)(C), 1170.12, subd. (c)(2)(C).)"

(*People v. Superior Court (Martinez)* (2014) 225 Cal.App.4th 979, 988-989, italics omitted (*Martinez*.)

If a defendant satisfies all three eligibility requirements, he or she must be resentenced to a second strike term unless the trial court, "in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety." (§ 1170.126, subd. (f); *Yearwood, supra*, 213 Cal.App.4th at p. 170.) If, however, "the inmate does not satisfy one or more of the [eligibility] criteria, section 1170.126 grants the trial court no power to do anything but deny the petition for recall of sentence." (*Martinez*, *supra*, 225 Cal.App.4th at p. 989.)

III.

FACTUAL AND PROCEDURAL BACKGROUND

On October 2, 2014, Rider's trial counsel filed a petition under section 1170.126 to recall Rider's sentence. The petition was based on the following allegations: Rider is a third strike offender serving a term of at least 25 years to life based on a conviction for failing to register as a sex offender. (§ 290, subd. (g)(2).) This current offense is a "non-serious and non-violent felony." In the case in which Rider was convicted and sentenced for his current offense, five "prior strikes" were alleged and proved: one conviction for oral copulation by force or violence (§ 288a, subd. (c)); one conviction for attempted voluntary manslaughter (§§ 664/192.1); and three convictions for robbery (§ 211).

On November 18, 2014, the People filed an opposition to Rider's petition. The People argued that Rider was ineligible for resentencing under section 1170.126, subdivision (e)(3) because his prior conviction for oral copulation by force constitutes a "sexually violent offense" within the meaning of section 1170.12, subdivision (c)(2)(C)(iv). The People also argued that even if Rider was eligible for resentencing, the trial court should exercise its discretion to deny the petition because Rider's criminal history and misconduct in prison establishes that resentencing him would "pose an unreasonable risk of danger to public safety." (Quoting § 1170.126, subd. (f).)

On December 5, 2014, the trial court conducted a hearing to determine whether Rider was eligible for resentencing under section 1170.126. Rider's counsel conceded that the prior conviction for oral copulation by force in violation of section 288a, subdivision (c) was a disqualifying offense, but he argued that the trial court had discretion under section 1385 to strike that prior in the interests of justice. The trial court denied the petition, finding Rider was not eligible for resentencing because of his disqualifying prior and that the court did not have discretion to strike that prior conviction under section 1385.

IV.

DISCUSSION

Rider does not dispute that his prior strike conviction for a sexually violent offense makes him ineligible for resentencing under subdivision (e)(3) of section 1170.126. His sole claim is that the trial court erred by concluding that it did not have discretion to make Rider eligible for resentencing by dismissing his disqualifying prior conviction. According to Rider, the court had such discretion under section 1385, which provides, in pertinent part: "The judge or magistrate may, either of his or her own motion or upon the application of the prosecuting attorney, and in furtherance of justice, order an action to be dismissed." (§ 1385, subd. (a).)

Section 1385 has been read to authorize a trial court to strike a prior conviction allegation "that would otherwise increase a defendant's sentence." (See, e.g., *People v. Garcia* (1999) 20 Cal.4th 490, 496, citing *People v. Burke* (1956) 47 Cal.2d 45, 50-51, disapproved on other grounds in *People v. Sidener* (1962) 58 Cal.2d 645, 647.) However, Rider mistakenly relies on cases applying this rule because they all involved situations in which a trial court imposed a sentence for *a current offense* and thus indisputably had jurisdiction over the cause. (*Ibid*.; see also *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 524, fn. 11 ["it is well established that a court may exercise its power to strike under section 1385 'before, during or after trial,' up to the time judgment is pronounced".) Here, by contrast, Rider was already serving an indeterminate sentence for his current offense when he filed his petition.

"[G]enerally a trial court lacks jurisdiction to resentence a criminal defendant after execution of sentence has begun." (*People v. Howard* (1997) 16 Cal.4th 1081, 1089

(*Howard*).) "There are few exceptions to the rule." (*People v. Turrin* (2009) 176 Cal.App.4th 1200, 1204.) Section 1170.126 constitutes such an exception, but only within limited confines established by the statute itself. As another court addressing this issue has explained: "Section 1170.126 grants a trial court the power to determine an inmate's eligibility to be resentenced under the Reform Act only if the inmate satisfies the three criteria set out in subdivision (e) of the statute . . . and contains no provision authorizing a trial court to disregard the required criteria. (§ 1170.126, subd. (e).) Rather, the plain language of subdivision (e) clearly provides that an inmate must first satisfy each criteria set out in subdivision (e) of section 1170.126 before he or she can be resentenced under the Reform Act, and gives the trial court no discretion to depart from the three-step requirement. In other words, if the inmate does not satisfy one or more of the criteria, section 1170.126 grants the trial court no power to do anything but deny the petition for recall of sentence." (*People v. Brown* (2014) 230 Cal.App.4th 1502, 1511-1512, italics omitted (*Brown*).)

Like Rider, the petitioner in *Brown* had a prior conviction for a violent sex offense which made him ineligible for resentencing under the Act, and he appealed the denial of his petition on the ground that the trial court refused to consider dismissing the disqualifying prior. (*Brown*, *supra*, 230 Cal.App.4th at p. 1506.) In affirming the trial court order, the *Brown* court held: "[T]he absence of discretionary authority in section 1170.126, subdivision (e) shows the Legislature intended to withhold statutory power of a trial court to exercise its discretion in the furtherance of justice under section 1385 in determining a defendant's eligibility to be resentenced under the Reform Act. Clearly, the Legislature expressly authorized a trial court to exercise its discretion when determining whether granting relief would pose an unreasonable risk of danger to public safety as noted in section 1170.126, subdivisions (f) and (g). However, the plain language of subdivision (e) of the statute authorizes no such discretionary power to a trial court in deciding an inmate's eligibility under the Reform Act." (*Brown,* at p. 1512.)

On appeal, Rider argues that this court should not follow *Brown* because controlling Supreme Court decisions establish that a trial court has the power to strike a prior conviction under section 1385 unless the Legislature has evidenced a contrary intent. Indeed, Rider contends that the *Brown* court "exceeded its jurisdiction" by failing to follow Supreme Court precedent.

Rider misconstrues the pertinent jurisdictional issue. As the *Brown* court recognized, section 1385 does not confer jurisdiction in the first instance. Under section 1170.126, the trial court has jurisdiction to recall a sentence once execution has begun *only* if the prisoner meets the eligibility criteria in section 1170.126, subdivision (e). (*Brown*, *supra*, 230 Cal.App.4th at pp. 1511-1512.) We are persuaded by *Brown* and agree with its conclusion that section 1170.126 does not confer discretion on the trial court to strike a prior conviction when deciding an inmate's eligibility for resentencing under the Act.

Rider insists that section 1170.126 must be read to confer trial court discretion to dismiss a prior conviction when making an eligibility ruling. According to Rider, that discretion is implicit in the requirement that the prosecution plead and prove a disqualifying prior conviction. Rider reasons that the trial court's power to determine whether a disqualifying prior conviction allegation has been proven necessarily embraces the discretion to "dismiss" that allegation in the interest of justice. This argument begins with a false premise: the postconviction release provisions of the Act do not require pleading or proof of an ineligibility factor. (*People v. Brimmer* (2014) 230 Cal.App.4th 782, 802-803 (*Brimmer*).)

As noted above, the Act contains two parts. "[T]he first part is prospective only, reducing the sentence to be imposed in future three strike cases where the third strike is not a serious or violent felony [citation]; the second part is *retrospective*, providing *similar*, but not *identical*, relief for prisoners already serving third strike sentences in cases where the third strike was not a serious or violent felony [citation]." (*People v. Superior Court* (*Kaulick*) (2013) 215 Cal.App.4th 1279, 1292, original italics.)

"[T]he Act requires pleading and proof when ineligibility for lenient treatment under the Act applies prospectively, that is, to persons currently charged with a three strikes offense that is not itself defined as serious or violent. (§§ 667, subd. (e)(2)(C), 1170.12, subd. (c)(2)(C).) No pleading and proof language appears in the part of the Act addressing relief to persons previously sentenced under the Three Strikes law. (§ 1170.126, subd. (e).)" (*Brimmer, supra*, 230 Cal.App.4th at pp. 802.)

"Nowhere in the resentencing provisions of section 1170.126, subdivision (e), is there any reference to pleading and proof of disqualifying factors. Generally speaking, a pleading and proof requirement will not be implied. [Citation.] Instead, . . . , under section 1170.126, subdivision (f), 'the [trial] court shall determine whether the petitioner satisfies the criteria in subdivision (e).' [Citation.] There is no provision for the People to plead or prove anything; the burden falls on the trial court to make the determination whether a defendant meets the prima facie criteria for recall of sentence." (*Brimmer*, *supra*, 230 Cal.App.4th at pp. 802-803; accord, *People v. Guilford* (2014) 228 Cal.App.4th 651, 656-657; *People v. Osuna* (2014) 225 Cal.App.4th 1020, 1033; *People v. Blakely* (2014) 225 Cal.App.4th 1042, 1058; *People v. White* (2014) 223 Cal.App.4th 512, 527.)

Finally, Rider argues that if the trial court did not have discretion to strike his prior conviction then his right to equal protection was violated. His basic claim appears to be that the trial court must be deemed to have discretion to strike his prior conviction because it clearly does have such discretion when imposing an original sentence under the Act.

" 'The concept of equal protection recognizes that persons who are similarly situated with respect to a law's legitimate purposes must be treated equally. [Citation.] Accordingly, " '[t]he first prerequisite to a meritorious claim under the equal protection clause is a showing that the state has adopted a classification that affects two or more similarly situated groups in an unequal manner.' " [Citation.] "This initial inquiry is not whether persons are similarly situated for all purposes, but 'whether they are similarly situated for purposes of the law challenged.' " [Citation.]' [Citations.]" (*People v. Losa* (2014) 232 Cal.App.4th 789, 792-793 (*Losa*).)

As an inmate requesting resentencing under section 1170.126, Rider is not similarly situated to a defendant being sentenced for the first time under the Act. (*Losa*, *supra*, 232 Cal.App.4th at p. 793; *People v. Thurston* (2016) 244 Cal.App.4th 644, 658; see also *Kaulick*, *supra*, 215 Cal.App.4th at p. 1306 [prisoner seeking resentencing under section 1170.126 " 'not similarly situated to individuals facing involuntary commitment on a finding of dangerousness' "].) Thus, Rider has failed to establish that the denial of his resentencing petition violated his right to equal protection. (*Ibid*.; see also *Yearwood*, *supra*, 213 Cal.App.4th at pp. 178-179 ["the distinction drawn between felony offenders sentenced before, and those offenders who are sentenced after the Act's effective date, does not violate appellant's state or federal equal protection rights"].)

V.

DISPOSITION

The order denying Rider's resentencing petition is affirmed.

RUVOLO, P. J.

We concur:

REARDON, J.

STREETER, J.